

NOT FOR CITATION
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RUSSELL GENE RODRIGUEZ,

Petitioner,

v.

JEANNE WOODFORD,

Respondent.

No. C 07-02235 JF (PR)

ORDER DENYING PETITION
FOR WRIT OF HABEAS
CORPUS AND DENYING
REQUEST FOR CERTIFICATE
OF APPEALABILITY

Petitioner, a California prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court ordered Respondent to show cause why the petition should not be granted. Respondent filed an answer and a supporting memorandum of points and authorities addressing the merits of the petition, and Petitioner filed a traverse. Having reviewed the papers and the underlying record, the Court concludes that Petitioner is not entitled to habeas corpus relief and will deny the petition.

PROCEDURAL BACKGROUND

On May 3, 2005, Petitioner pleaded guilty in the Santa Clara Superior Court to one count of petty theft with a prior conviction and one count of receiving stolen property. Petitioner also admitted four “strike” prior convictions and two prior prison terms. On September 15, 2005, the trial court sentenced Petitioner to twenty-five years to life in prison.

Petitioner appealed the judgment. On November 20, 2006, the California Court of Appeal affirmed. On February 7, 2007, the California Supreme Court denied review. Thereafter, Petitioner filed unsuccessful state habeas petitions in the Santa Clara Superior Court, California Court of Appeal, and California Supreme Court.

Petitioner filed the instant federal action on April 24, 2007.

FACTUAL BACKGROUND

Petitioner does not dispute the following facts, which are taken from the probation officer’s pre-sentence report. (Resp. Ex. A, p. 117-119.) On the morning of August 3, 2004, Grant Morrow (“Morrow”) hired several plumbers, one of whom was the Petitioner, to perform some plumbing work at this house. (Id. at 117.) After showing them around the house, Morrow left. (Id. at 118.) That night, when Morrow returned to the house, he received a phone call from First U.S. Bank regarding several suspicious transactions on his cards. (Id.) Morrow reported that he did not make the transactions nor did he give anyone permission to do so. (Id.) Morrow then looked for and discovered that his First U.S. Bank credit card was missing. (Id.)

One of the unauthorized purchases was from Journey’s Shoe. (Id.) The police contacted the owner of the plumbing company who provided Petitioner’s personal information. (Id.) The police also communicated with an employee of Journey’s Shoe who reported that two suspects entered the store, one of whom fit the description of Petitioner. (Id.)

1 The following day, police showed up at Petitioner's residence and were told that
2 Petitioner was upstairs taking a shower. (Id.) While waiting for Petitioner, police found
3 the shoes that were purchased at Journey's Shoe with Morrow's credit card. (Id.) Then,
4 the officers learned that Petitioner had crawled through a second story window and fled
5 the residence. (Id.)

6 7 **LEGAL CLAIMS**

8 Petitioner asserts the following claims for relief: (1) counsel was ineffective in
9 giving Petitioner incorrect information regarding a guilty plea, which coerced Petitioner
10 to plead guilty; (2) counsel was ineffective in failing to investigate the case or present oral
11 argument at the hearing on his suppression motion; and (3) Petitioner's sentence is cruel
12 and unusual.

13 14 **DISCUSSION**

15 **A. Standard of Review**

16 This Court will entertain a petition for a writ of habeas corpus "in behalf of a
17 person in custody pursuant to the judgment of a State court only on the ground that he is
18 in custody in violation of the Constitution or laws or treaties of the United States." 28
19 U.S.C. § 2254(a). The petition may not be granted with respect to any claim adjudicated
20 on the merits in state court unless the state court's adjudication of the claim: "(1) resulted
21 in a decision that was contrary to, or involved an unreasonable application of, clearly
22 established federal law, as determined by the Supreme Court of the United States; or (2)
23 resulted in a decision that was based on an unreasonable determination of the facts in
24 light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

25 "Under the 'contrary to' clause, a federal habeas court may grant the writ if the
26 state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a
27 question of law or if the state court decides a case differently than [the] Court has on a set
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1 of materially indistinguishable facts.” Williams (Terry) v. Taylor, 529 U.S. 362, 412-413
2 (2000). “Under the ‘reasonable application clause,’ a federal habeas court may grant the
3 writ if the state court identifies the correct governing legal principle from [the] Court's
4 decisions but unreasonably applies that principle to the facts of the prisoner's case.” Id. at
5 413. “[A] federal habeas court may not issue the writ simply because that court
6 concludes in its independent judgment that the relevant state-court decision applied
7 clearly established federal law erroneously or incorrectly. Rather, that application must
8 also be unreasonable.” Id. at 411.

9 “[A] federal habeas court making the ‘unreasonable application’ inquiry should
10 ask whether the state court’s application of clearly established federal law was
11 ‘objectively unreasonable.’” Id. at 409. In examining whether the state court decision
12 was objectively unreasonable, the inquiry may require analysis of the state court’s method
13 as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th Cir. 2003). The
14 standard for “objectively unreasonable” is not “clear error” because “[t]hese two
15 standards . . . are not the same. The gloss of error fails to give proper deference to state
16 courts by conflating error (even clear error) with unreasonableness.” Lockyer v.
17 Andrade, 538 U.S. 63, 75 (2003).

18 A federal habeas court may grant the writ if it concludes that the state court’s
19 adjudication of the claim “results in a decision that was based on an unreasonable
20 determination of the facts in light of the evidence presented in the State court
21 proceeding.” 28 U.S.C. § 2254(d)(2). The court must presume correct any determination
22 of a factual issue made by a state court unless the petitioner rebuts the presumption of
23 correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

24 Where the highest state court to consider Petitioner’s claims issued a summary
25 opinion which does not explain the rationale of its decision, federal review under section
26 2254(d) is of the last state court opinion to reach the merits. See Ylst v. Nunnemaker,

1 501 U.S. 797, 801-06 (1991); Bains v. Cambra, 204 F.3d 964, 970-71, 973-78 (9th Cir.
2 2000).

3 **B. Analysis of Legal Claims**

4 1. Ineffective Assistance of Counsel - Coerced Guilty Plea

5 Petitioner claims that he received ineffective assistance of counsel because counsel
6 “coerced” him into pleading guilty by advising him that he would not receive a life
7 sentence and by failing to explain the conditions of the plea. (Am. Pet. at 7.) Respondent
8 contends that this claim is not only unexhausted but also meritless. Even assuming that
9 claim is unexhausted, this Court may deny it on the merits. See 28 U.S.C. § 2254(b)(2).

10 A defendant seeking to challenge the validity of his guilty plea on the ground of
11 ineffective assistance of counsel must satisfy the two-part standard of Strickland v.
12 Washington, 466 U.S. 668, 687 (1984) by showing “that (1) his counsel’s representation
13 fell below an objective standard of reasonableness, and (2) there is a reasonable
14 probability that, but for [his] counsel’s errors, he would not have pleaded guilty and
15 would have insisted on going to trial.” Womack v. Del Papa, 497 F.3d 998, 1002 (9th Cir.
16 2007) (internal quotation omitted).

17 In order to establish ineffective assistance from counsel’s inaccurate prediction
18 regarding the likely sentence following a guilty plea, a petitioner must establish a “‘gross
19 mischaracterization of the likely outcome’ of a plea bargain ‘combined with . . . erroneous
20 advice on the probable effects of going to trial.’” Sophanthavong v. Palmateer, 378 F.3d
21 859, 868 (9th Cir. 2004). An attorney’s incorrect prediction as to the likely sentence
22 following a guilty plea does not amount to erroneous advice, or satisfy the deficiency
23 prong of Strickland, simply because the trial court ultimately imposed a longer sentence.
24 Womack, 497 F.3d at 1002-1003. Where a defendant was informed prior to entering his
25 guilty plea of the potential sentence he could receive, he cannot establish prejudice from
26 counsel’s incorrect prediction as to his sentence. Id. at 1003-04.

27 Here, Petitioner does not identify the specific conditions of the plea agreement
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1 about which counsel failed to advise him. Further, the transcript of the plea hearing
2 belies Petitioner's assertions that he believed he would receive a maximum sentence of
3 thirty-two months. (Trav. at 6.) During the plea colloquy, the trial court recited the
4 parties' understanding of the plea agreement, stating, "[Petitioner] would plead guilty or
5 no contest as to Counts 1 and 3 and receive no promises from the Court, no offers from
6 the District Attorney's office and the maximum term in this case is twenty-seven years to
7 life in prison." (Resp. Ex. B, p. 119.) Petitioner affirmed that the trial court's recitation
8 was his understanding of the agreement and there had been no further promises made to
9 him. (Id.) Petitioner acknowledged in open court that he had not been threatened or
10 coerced to plead guilty, that he had discussed the matter with counsel, that the maximum
11 sentence he could receive was twenty-seven years to life, and that he was pleading
12 knowingly and voluntarily. (Id. at 120-21.) The trial court read the rights that Petitioner
13 was waiving by pleading guilty, and Petitioner affirmed that he understood those rights.
14 (Id. at 121-23.)

15 Nor does Petitioner allege that but for counsel's alleged errors, there was a
16 reasonable probability that he would have gone to trial. At the outset, Petitioner was
17 charged with three felonies, four strike priors, and two prior prison terms. His sentencing
18 exposure was twenty-seven years to life to seventy-seven years to life, depending on
19 whether the sentences would run concurrently or consecutively. By agreeing to plead
20 guilty, Petitioner limited his exposure to the low-end of his sentencing range. There is no
21 evidence in the record supporting Petitioner's assertion that counsel misadvised him or
22 that Petitioner was prejudiced by counsel's advice.

23 Accordingly, the state court's determination was not contrary to, or an
24 unreasonable application of, clearly established Supreme Court precedent, nor was it
25 based on an unreasonable determination of the facts in light of the evidence presented. 28
26 U.S.C. § 2254(d)(1), (2).

2. Ineffective Assistance of Counsel - Suppression Motion

Petitioner claims that he received ineffective assistance of counsel because counsel failed to investigate or present oral argument in support of his motion to suppress. (Am. Pet. at 7-8; Trav. at 8-11.) Again, Respondent contends that this claim is not only unexhausted but also meritless. Again, this Court will deny the claim on the merits. See 28 U.S.C. § 2254(b)(2).

It is well-established that a valid plea of guilty bars habeas review of most non-jurisdictional claims alleging antecedent violations of constitutional rights. Tollett v. Henderson, 411 U.S. 258, 267 (1973). As the Supreme Court explained in Tollett, “[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea. . .” Id. at 267; see Moran v. Godinez, 57 F.3d 690, 700 (9th Cir. 1994) (superseded on other grounds by AEDPA as described in Van Tran v. Lindsey, 212 F.3d 1143 (9th Cir. 2000)). In other words, a guilty plea forecloses consideration of pre-plea constitutional deprivations in federal habeas corpus. Tollett, 411 U.S. at 267. Other than a claim that the court lacked jurisdiction, which Petitioner has not alleged, the only claim that can be raised in a habeas corpus petition after a guilty plea is a challenge to the constitutional validity of the plea. Hill v. Lockhart, 474 U.S. 52, 56 (1985).

This authority does not preclude Petitioner from asserting a claim that his plea was not voluntary and intelligent or that he received ineffective assistance of counsel in connection with his plea. Tollett, 411 U.S. at 266. However, claims of ineffective assistance that are based on acts or omissions of counsel that preceded and are not related to the validity of the plea may not be considered on federal habeas review. Moran, 57 F.3d at 700. Petitioner’s claim with respect to counsel’s investigation and presentation of his motion to suppress involves an alleged pre-plea constitutional violation. Accordingly,

1 it is not cognizable on federal habeas review.

2 3. Cruel and Unusual Punishment

3 Petitioner argues that his twenty-five year to life sentence amounts to cruel and
4 unusual punishment in violation of the Eighth Amendment. A criminal sentence that is
5 not proportionate to the crime for which the defendant was convicted violates the Eighth
6 Amendment. Solem v. Helm, 463 U.S. 277, 303 (1983). But “outside the context of
7 capital punishment, successful challenges to the proportionality of particular sentences
8 will be exceedingly rare.” Id. at 289-90. For the purposes of review under 28 U.S.C.
9 § 2254(d)(1), it is clearly established that “[a] gross proportionality principle is applicable
10 to sentences for terms of years.” Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

11 In Harmelin v. Michigan, 501 U.S. 957 (1991), Chief Justice Rehnquist and Justice
12 Scalia joined in a two-justice plurality to conclude that Solem should be overruled and
13 that no proportionality review is required under the Eighth Amendment except with
14 respect to death sentences. Id. at 961-985. A three-justice concurrence concluded that
15 Solem should not be rejected and that the Eighth Amendment contains a narrow
16 proportionality principle that is not confined to death penalty cases, but that forbids only
17 extreme sentences which are grossly disproportionate to the crime. Id. at 997-1001.
18 Because no majority opinion emerged in Harmelin on the question of proportionality, the
19 view that the Eighth Amendment forbids only extreme sentences that are grossly
20 disproportionate to the crime is considered the holding of the Court. United States v.
21 Bland, 961 F.2d 123, 128-29 (9th Cir. 1992).

22 In judging the appropriateness of a sentence under a recidivist statute, a court may
23 take into account the government’s interest not only in punishing the offense of
24 conviction, but also its interest ““in dealing in a harsher manner with those who [are]
25 repeat[] criminal[s].”” Bland, 961 F.2d at 129 (quoting Rummel v. Estelle, 445 U.S. 263,
26 276 (1980)). The Eighth Amendment does not preclude a state from making a judgment
27 that protecting the public safety requires incapacitating criminals who have already been
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1 convicted of at least one serious or violent crime, as may occur in a sentencing scheme
2 that imposes longer terms on recidivists. Ewing v. California, 538 U.S. 11, 29-30 (2003)
3 (upholding twenty-five-to-life sentence for recidivist convicted of grand theft); Rummel,
4 445 U.S. at 284-85 (upholding life sentence with possibility of parole for recidivist
5 convicted of fraudulent use of credit card for \$80, passing forged check for \$28.36 and
6 obtaining \$120.75 under false pretenses). Substantial deference is granted to state
7 legislature's determination of the types and limits of punishments for crimes. United
8 States v. Gomez, 472 F.3d 671, 673-74 (9th Cir. 2006).

9 In addressing this claim in Petitioner's case, the state appellate court properly
10 relied upon these Supreme Court cases above and corresponding California law as
11 explicated in In re Lynch, 8 Cal. 410 (1972). (Resp.'s Ex. D.) The court concluded
12 properly that Petitioner's current offenses were no less serious than those offenses at issue
13 in Rummel, Ewing, and Lockyer. (Id. at 10.) The court relied upon the fact that
14 Petitioner's sentence was punishment not only for the instant offenses but also for
15 committing the crimes as a recidivist offender and that recidivism justifies the imposition
16 of longer sentences for subsequent offenses. (Id. at 10-11.) The court noted that
17 Petitioner repeatedly had re-offended, had a criminal history spanning more than twenty-
18 five years, and consistently performed poorly on parole. (Id. at 11.) The court's
19 conclusion that Petitioner's sentence was not cruel and unusual thus was not contrary to
20 or an unreasonable application of United States Supreme Court authority. (Id.)

21 **C. Certificate of Appealability**

22 The federal rules governing habeas cases brought by state prisoners recently have
23 been amended to require a district court that denies a habeas petition to grant or deny a
24 certificate of appealability ("COA") in its ruling. See Rule 11(a), Rules Governing §
25 2254 Cases, 28 U.S.C. foll. § 2254 (effective December 1, 2009). In light of the
26 foregoing discussion, the Court concludes that Petitioner has not shown "that jurists of
27 reason would find it debatable whether the petition states a valid claim of the denial of a
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1 constitutional right [or] that jurists of reason would find it debatable whether the district
2 court was correct in its procedural ruling.” Slack v. McDaniel, 529 U.S. 473, 484 (2000).
3 Accordingly, the Court declines to issue a COA.

4
5 **CONCLUSION**

6 The Court concludes that Petitioner has failed to show any violation of his federal
7 constitutional rights in the underlying state criminal proceedings. Accordingly, the
8 petition for writ of habeas corpus and COA are DENIED.

9 The Clerk shall terminate all pending motions, enter judgment and close the file.

10 IT IS SO ORDERED.

11 DATED: 3/24/10


JEREMY FOGEL
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

RUSSELL GENE RODRIGUEZ,

Petitioner,

v.

JEANNE WOODFORD,

Respondent.

Case Number: CV07-02235 JF

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on 4/7/10, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Russell Gene Rodriguez V-97356
Pleasant Valley State Prison
P.O. Box 8504
D-2-138 Low
Coalinga, CA 93210

Dated: 4/7/10

/s/

Richard W. Wieking, Clerk
By: Diana Munz, Deputy Clerk

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